

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 13-CR-215

GUSTAVO GUTIERREZ,

Defendant.

ORDER ON DEFENDANT GUTIERREZ'S PRETRIAL MOTIONS

BACKGROUND

On November 5, 2013, a grand jury sitting in the Eastern District of Wisconsin returned a three count indictment against defendant Gustavo Gutierrez ("Gutierrez") and five other defendants. Gutierrez is charged in Count One of the indictment with knowingly and intentionally conspiring with certain other named defendants and others both known and unknown to the grand jury, to distribute one kilogram or more of heroin and five kilograms or more of cocaine, all in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846, and 18 U.S.C. § 2. Gutierrez was arraigned on the charge and entered a plea of not guilty. Trial before the Honorable Charles N. Clevert, Jr. has not yet been scheduled.

DISCUSSION

Gutierrez has filed the following pretrial motions, which are now pending before this Court: (1) a motion for a proffer pursuant to *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978); (2) a motion requiring the government to produce the final versions of any charts, summaries, or calculations it intends to use at trial at least one month before trial; (3) a

motion for an order requiring the government to reveal agreements entered into between the government and prosecution witnesses more than thirty days prior to trial; and (4) a motion to adopt and incorporate any co-defendant's motions as his own. The government does not oppose the motions. (Docket # 51.) I will address each in turn.

1. Motion for a *Santiago* Proffer (Docket # 44)

Gutierrez moves the Court to require the government to file a pretrial proffer at least fourteen days before trial so that the Court can determine the admissibility of statements made by co-conspirators, in accordance with *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978) and Fed. R. Evid. 801(d)(2)(E).

Statements of co-conspirators are admissible if the government convinces the court, as a preliminary matter and by a preponderance of the evidence, that (1) a conspiracy existed; (2) that the defendant and declarant were members thereof; and (3) that the proffered statements were made during the course of and in furtherance of the conspiracy. *Santiago*, 582 F.2d at 1134-35; *see also United States v. Cox*, 923 F.2d 519, 526 (7th Cir. 1994). In *Cox*, the court set forth several procedures a court could employ in making the admissibility determinations, such as requiring the government to file a proffer before trial; conducting a hearing on the matter; or in the absence of a pretrial proffer, the court may conditionally admit testimony subject to the government's eventual proof of the three foundational elements noted above. *See Cox*, 923 F.2d at 526.

It is the well-established practice of this district not to conduct a hearing, or even require a proffer, on these matters in advance of trial. *See United States v. Everett*, No. 10-CR-167, 2011 WL 2162790, *1 (E.D. Wis. June 2, 2011); *United States v. Arnett*, No.

04-CR-285, 2005 WL 6111778, *38 (E.D. Wis. Apr. 13, 2005). Judge Clevert may wish to discuss this motion and his procedures for resolving the same with counsel at the final pretrial conference. For these reasons, no ruling on the merits of Gutierrez's motion for a *Santiago* proffer will be made by this Court. Instead, this Court defers entirely to Judge Clevert on this issue.

2. Motion for Charts, Summaries, or Calculations (Docket # 45)

Gutierrez moves the Court for an order requiring the government to produce the final versions of any charts, summaries, or calculations it intends to use at trial at least one month before trial, pursuant to Fed. R. Evid. 1006, Fed. R. Crim. P. 16(a)(1)(C)-(E), and the Fifth and Sixth Amendments. The government does not contest this motion. As such, Gutierrez's motion is granted.

3. Motion to Reveal Agreements (Docket # 46)

Gutierrez moves the Court for an order directing the government to reveal any agreements entered into between the government and any prosecution witness more than 30 days prior to trial. The government does not contest this motion. As such, Gutierrez's motion is granted.

4. Motion to Adopt Other Motions (Docket # 47)

Finally, Gutierrez moved to adopt the motions of any of his co-defendants. No motions were filed by any of Gutierrez's co-defendants. As such, this motion is moot.

NOW, THEREFORE, IT IS ORDERED that the Court defers ruling on defendant's motion for a *Santiago* proffer (Docket # 44) to Judge Clevert.

IT IS FURTHER ORDERED that defendant's motion requiring the government to

produce the final versions of any charts, summaries, or calculations it intends to use at trial at least one month before trial (Docket # 45) is **GRANTED**.

IT IS FURTHER ORDERED that defendant's motion requiring the government to reveal any agreements entered into between the government and any prosecution witness more than 30 days prior to trial (Docket # 46) is **GRANTED**.

FINALLY, IT IS ORDERED that defendant's motion to adopt the motions of his co-defendant's (Docket # 47) is **MOOT**.

Your attention is directed to 28 U.S.C. § 636(b)(1)(A) and Fed. R. Crim. P. 59(a) (as amended effective December 1, 2009) whereby written objections to this order or part thereof may be filed within fourteen days of service of this order. Objections are to be filed in accordance with the Eastern District of Wisconsin's electronic case filing procedures. Courtesy paper copies of any objections shall be sent directly to the chambers of the district judge assigned to the case. Failure to file a timely objection with the district court shall result in a waiver of a party's right to appeal.

Dated at Milwaukee, Wisconsin this 20th day of May, 2014.

BY THE COURT

s/Nancy Joseph
NANCY JOSEPH
United States Magistrate Judge